

Fee Waiver Request

Responses from 18 Companies Informing EPA's Study on Potential Impacts of Hydraulic Fracturing on Drinking Water Resources

Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and EPA's implementing regulations, 40 C.F.R. § 2.107(l), the Environmental Integrity Project (EIP) requests that all charges (e.g., search, review, and duplication fees) incurred in connection with this request be waived. The legislative history of FOIA indicates that the fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005) (internal quotations and citations omitted). EIP is a national nonprofit organization dedicated to the integrity and enforcement of our environmental laws. EIP's work combines research, reporting, and media outreach to spotlight illegal pollution and encourage federal and state agencies to take enforcement action to stop the practices leading to such pollution.

As discussed below, EIP satisfies the two-pronged test for a fee waiver established in FOIA and outlined in EPA's implementing regulations because: (i) "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government," and (ii) disclosure of the information "is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1).

I. Disclosure of the Requested Information is in the Public Interest Because It Will Contribute Significantly to Public Understanding of the Operations or Activities of the Government

EIP qualifies for the fee waiver because the requested information will "contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1), (2).

A. The Subject of the Request Concerns the Operations and Activities of the Government

EIP seeks records related to responses from nine hydraulic fracturing companies and nine companies that operate oil and gas wells requested by EPA to inform the Agency's study on the potential impacts of hydraulic fracturing for oil and gas on drinking water resources. Given that these potential impacts and EPA's documentation of them are central to EPA's role as a regulator, investigator, gatherer of information, and enforcer under the Safe Drinking Water Act (SDWA), we believe that these records necessarily involve the operations and activities of the government. This consideration and decision making clearly concerns EPA's "operations or activities." 40 C.F.R. § 2.107(l)(2)(ii).

B. The Disclosure is Likely to Contribute Significantly to the Public Understanding of the Government's Operations or Activities

The guiding test to determine whether or not the disclosure of the requested information will contribute significantly to public understanding of the government's operations or activities is "whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject." *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 815 (2d Cir. 1994). After reviewing the information provided, EIP intends to use its resources and expertise to inform and educate the public and other nonprofit advocacy organizations as to the relationship between hydraulic fracturing and drinking water resources, the general water quantity and quality requirements for hydraulic fracturing, the composition and lifecycle of hydraulic fracturing fluids from water acquisition to produced hydraulic fracturing wastewater, and the need for stronger SDWA regulations to protect human health and the environment, especially concerning drinking water, in light of the significant increase in hydraulic fracturing activities across the country. More specifically, EIP will use the requested records to inform the public through our website, reports, and other publications, all of which are available free of charge to interested parties.

II. Obtaining the Information is of No Commercial Interest to EIP

The second element of the fee waiver analysis concerns the requester's "commercial interest" in the information requested. There are two relevant inquiries to determine whether the information requested is "primarily in the commercial interest of the requester" and a fee waiver is appropriate if either inquiry is satisfied. 40 C.F.R. § 2.107(l)(3). The first inquiry is whether the requester has a "commercial interest that would be furthered by disclosure." 40 C.F.R. § 2.107(l)(3)(i). Here, as a 501(c)(3) nonprofit organization, EIP has no commercial, trade, or profit interest in the material requested. EIP will not be paid for or receive other commercial benefits from the publication or dissemination of the information requested.

The second inquiry concerns the requester's primary interest in the disclosure. *See* 40 C.F.R. § 2.107(l)(3)(ii). The requested materials will allow for a more thorough analysis of EPA's investigations, the emissions from the monitored sites, and any need for greater monitoring, regulation, or enforcement. Even assuming *arguendo* that EIP does have a commercial interest in the requested materials, a complete fee waiver would be appropriate under this second inquiry because EIP's primary interest in the materials is noncommercial, i.e., to inform the public about the operations and activities of the government. Therefore, the "disclosure of the information . . . is not primarily in the commercial interest of" EIP, and a fee waiver is warranted. 5 U.S.C. § 552(a)(4)(A)(iii).

Conclusion

In light of the foregoing, the requested records bear directly on identifiable operations and activities of EPA, will contribute significantly to a broad public understanding of important matters relating to government functioning and compliance with federal laws, and will not serve any commercial interest on the part of EIP. Therefore, a fee waiver is appropriate.